IN THE

Supreme Court of the United States

October Term, 1944

No. .....

MADEIRENSE DO BRASIL, S/A,

Petitioner,

against

STULMAN-EMRICK LUMBER CO.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner has submitted a statement of the facts and also statements as to the opinions below, jurisdiction, questions presented, and reasons for granting of the writ in the foregoing petition. Additional facts will be stated in the brief herewith presented.

POINT I

Rule 56 of the Federal Rules of Civil Procedure denies power to a District Judge to grant summary judgment where the amount of damages is in dispute; where the record contains statements which permit of more than one inference with respect to the principal factors underlying the computation of damages; where a jury would be at liberty to disbelieve the evidence forming the basis of the decision; and where, if the counterclaim had not been contested, such District Judge would have been required by Rule 55 (b) (2) of said Rules to call a jury on the issue of damages.

Rule 56(c) of the Rules of Civil Procedure reads in part as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file,

> together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In the case of *Sartor, et al* v. *Arkansas Natural Gas Co.*, 321 U. S. 620, Mr. Justice Jackson, writing for the majority of this Court, said at pages 623 and 624:

> "Where the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process, *it is doubtful whether summary judgment is warranted on any showing. But at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.*" (Emphasis supplied.)

The issue in that case related to the market value of natural gas at the wellhead. The plaintiffs were the owners of lands in Louisiana which had been leased by them to the defendant for natural gas development. The lease provided that the plaintiffs should receive "1/8th of the value of such gas calculated at the rate of market price and no less than 3¢ per 1,000 cu. ft. corrected to 2 lbs. above atmospheric pressure." For many years the lessee made settlement at the 3¢ rate. Suit was brought by the plaintiff on the contention that during certain years in which the lease was effective, the market price was considerably above 3¢. Following a number of proceedings, a motion was made by defendant for summary judgment under Rule 56 of the Federal Rules of Civil Procedure to dismiss plaintiff's action with respect to the fees claimed by it for natural gas produced prior to March 20, 1930, on the ground that it did not appear from the record that the plaintiff had suffered any damages, because the market value of natural gas at the wellhead during such years had been established at 3¢.

The majority of the Court found that although the weight of the evidence might be found by a trial court to be with the defendant, the District Court did not have the right, on a motion for summary judgment, to determine that plaintiff had not been damaged; and that the District Court could not withdraw defendant's witnesses from cross-examination, and could not pass upon the credibility and the weight to be given to their opinions, without requiring a trial in the regular manner.

The *Sartor* case thus lays down the rule, which has binding force on the respective Circuit Courts of Appeal throughout the country, that a District Court does not have the right under Rule 56 of the Federal Rules of Civil Procedure to make a summary disposition of disputed issues of damage, unless such disposition shall be based upon evidence which a jury would not be at liberty to disbelieve, and which would require a directed verdict for the moving party.

The dissenting opinion of Mr. Chief Justice Stone, in the *Sartor* case, was based upon the ground that there was in the case no evidence to show that the plaintiff had suffered damages. He held, accordingly, that the amount of damages was not in controversy, and that the Court was not precluded from giving summary judgment for the defendant. In reaching his decision, however, Mr. Chief Justice Stone recognized that Rule 56(c) of the Rules of Civil Procedure, excludes from the summary judgment procedure any issue as to the amount of damages, where the amount of damages is in dispute (321 U. S. 620, at page 629).

It is respectfully submitted that the decision of the Circuit Court of Appeals in the instant case is, on the facts of this case, clearly in conflict with the majority decision in the *Sartor* case; and also with the rule recognized in the dissenting opinion in that case.

The record in the instant case reveals the following evidence, presented in affidavit and documentary form, as to the bases of damages claimed by defendant:

1. The so-called admission by plaintiff of the market value of lumber in Brazil at the time of the alleged breach of the contract, contained in plaintiff's letter of January 9, 1941 (R., 86). The exact excerpt from that letter, relied upon, both by the District Court and by the Circuit Court of Appeals, reads as follows:

> "Our F. O. B. price is on the basis of $28.00 per 1,000 square feet."

2. The so-called admission of the freight rate on shipments from Brazil to New York, contained in the same letter of plaintiff dated January 9, 1941 (R., 86).

The above mentioned evidence was the only evidence considered by the lower courts in fixing the amount of damages awarded to the defendant. The majority opinion of the Circuit Court of Appeals emphasized that "no explanation or contradiction of this price (the alleged market value of the lumber) was made by plaintiff in its papers on the original motion" (R., 195, 196), as proof that the figure determined by it to be the market value of the lumber was not subject to attack.

However, there was other evidence in the record which would clearly permit an inference that the market price of lumber at the time of the breach was less than the figure determined by the lower courts. That evidence was completely ignored by the lower courts, both of which drew the inferences upon which their decisions were based from the evidence favorable to defendant, without regard to evidence supporting the plaintiff's position. The additional evidence referred to is as follows:

3. The statement contained in letter dated November 28, 1940, from Brazilian Minerals and Timbers Corp., the intermediary in the transaction, to the petitioner, to the effect that a firm in Parana, Brazil, was closing shipments of pine (the same kind of lumber which petitioner agreed to sell to respondent) "on the basis of $22.00 per 1,000′ F. O. B. Paranagua, giving to understand that for quantities of 200,000′ or more the F. O. B. price can be reduced" (R., 66).

Although this letter was written on November 28, 1940, and the alleged breach was found to have occurred as of January 31, 1941, the statement is some evidence that the market price on the date of the alleged breach might have been less than $28.00 per 1,000 feet, as found by the lower courts. Of course, the evidence is by no means conclusive, and petitioner does not assert that it is. In any event, however, it is ground for an inference that the market value of lumber on the date of the alleged breach was less than $28.00 per 1,000 feet; and a jury would be entitled to draw such an inference. Further than that, it is clearly indicative of the fact that the evidence relied upon by the lower courts was not evidence 'which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party'.

4. The statement contained in letter dated January 9, 1941, from Manoel Jacinto Ferreira, to Mr. Raul Alvarez of Brazilian Minerals & Timbers Corp., reading—

> "I do not understand how Curityba (a competitor of plaintiff) is selling pine to your country on bases which permit the payment of such freight rates" ($33.13 per 1000′) (R., 89).

It will be noted that this letter is dated on the same date as the plaintiff's letter of January 9, upon which the lower courts have relied in determing damages awarded to defendant. The writer of the letter was con-

nected with the petitioner, and the addressee was an officer of the Brazilian Minerals and Timbers Corp., to which concern the petitioner's letter of January 9 containing the alleged admission of market value had been directed.

The statement quoted clearly indicates that about the time of the alleged breach, Brazilian pine was being sold to concerns in this country by firms other than petitioner, on a better basis than petitioner could afford to sell it; and clearly justifies an inference that the petitioner's F. O. B. price, was its own price to its customers, and not the current market price of the lumber. Accordingly, the finding by the lower courts that the statement in plaintiff's letter of January 9, 1941, of its F. O. B. price was a "clear cut admission" of the market price is unquestionably erroneous. As Mr. Justice Frank said in his dissenting opinion (R., 200), "the letter did not discuss or intimate anything whatever as to the market price in Brazil of the lumber itself".

5. The statement contained in letter from Raul Alvarez to Manoel Jacinto Ferreira, dated January 16, 1941, reading:

> "It appears unbelieveable that the Lloyd should have raised the freight charges for pine to $33 per 1,000', *which is practically twice the price of the lumber at the sawmills in Parana*" (R., 91). (Emphasis supplied.)

This statement would, it is submitted, permit a jury to draw the inference that the market price of Brazilian pine, during the month of January 1941, when the alleged breach occurred, was between $16.00 and $17.00 per 1,000 feet. It is not contended that such figure represents the market price, but the important point is that such an inference can be drawn from the evidence in the record of this case. Accordingly, the inference actually drawn by the lower courts was not one "which a jury

would not be at liberty to disbelieve and which would require a directed verdict for the moving party".

In view of the evidence contained in the record, as outlined on the question of the market value of lumber in Brazil, at the time of the alleged breach of contract, it is submitted that the Circuit Court of Appeals has sanctioned the assumption by a District Judge of power denied to such District Judge; and that the summary judgment awarded to the defendant was not based upon evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party, and that the sanctioning of the procedure followed constitutes an unfortunate precedent improperly magnifying the power of a District Judge.

It is further submitted that the instant case also satisfies the requirements stated in the dissenting opinion of Mr. Justice Stone in the *Sartor* case, that the record must contain some evidence in favor of the defeated party, to justify a reversal of a decision granting summary judgment against such party. It is true that Mr. Justice Stone held that the party who seeks to upset a summary judgment must show that it tendered "probative evidence" to challenge the evidence submitted by the moving party. If the evidence which has been here outlined to show that the lower courts were not warranted in drawing the inference upon which their decisions were based, is not, strictly speaking, probative evidence; the same may be said of the evidence upon which the decisions of the lower courts were based. Certainly, a statement that the petitioner's F. O. B. price for lumber was $28.00 per 1,000 feet, while it may be some evidence of the market value of the lumber is not, in and of itself, probative of that fact. Such evidence has no greater weight than the cumulative evidence furnished by the statements in the above mentioned letters.

Indeed, in the strictest sense of the word "probative", there was no evidence on either side to justify the lower court in making summary disposition of the controversy; and the disputed issue of damages should clearly have been referred for trial, in the regular manner.

The patent injustice to the petitioner, resulting from the decision of the Circuit Court of Appeals is emphasized by the fact that, if the petitioner had defaulted in pleading to the counterclaim interposed by the defendant, the District Court could not have awarded damages to the respondent, without the aid of a jury on that issue (Rule 55 (b) (2)). Accordingly, by answering the counterclaim and by contesting respondent's motion for summary judgment, the petitioner has been placed in a worse position than if it had defaulted. Such a result may hardly be characterized as fair or equitable.

With respect to the determination of the lower courts that the freight rate at the time of the breach was $33.13 per 1,000 feet, it is submitted that petitioner's statement that such figure represented the freight rate quoted to it by one steamship line operating from Brazil to the United States, would hardly justify a finding that such amount was the only current freight rate at the time in question. In any event, this item was merely one of two essential items forming the basis for the damages, if any, to be awarded to the respondent; and even if it may be assumed that the current freight rate actually was $33.13 per 1,000 feet, the burden of the respondent to prove the market value of the lumber at the time of the breach was not met by respondent. Hence, respondent failed to prove one of the essential ingredients of its counterclaim for damages.

The fact that the petitioner did not marshal and present to the Court any evidence bearing upon the market value of the lumber at the time of the alleged breach is not a ground for the granting of summary judgment in favor of the respondent. The rule is well established, that a party seeking

damages has the burden of proving that he has suffered a loss, and of showing to what extent he has actually been damaged. 1 *Sedgwick, Damages* (9th Ed. 1913), Section 170. *Oklahoma Natural Gas Corp.* v. *Municipal Gas Co. of Muskogee,* 113 F. 2d 308 (C. C. A. 10th); *Burke, Kuipers and Mahoney* v. *Dallas Dispatch Co.,* 253 A. D. (New York) 206. It would seem to require no argument that, where the party seeking damages offers only incomplete and inconclusive evidence to sustain its claims, there is no obligation on the adverse party to furnish more cogent evidence to the contrary.

POINT II

In the state of the record in the lower Court, respondent's motion for summary judgment should have been denied; and petitioner's motion for summary judgment for the balance of the purchase price of the first shipment of lumber, which balance was admittedly due to petitioner in the amount claimed, should have been granted.

The reasons why respondent's motion for summary judgment should have been denied have been set forth under Point I. If those reasons shall be deemed sufficient to induce this Court to reverse the decision of the Circuit Court of Appeals, which affirmed the decision of the lower court granting respondent's motion for summary judgment; such reversal will require a holding that petitioner's motion for summary judgment for the balance due to it on the first shipment of lumber be granted (Rule 56 (d), Federal Rules of Civil Procedure).

POINT III

The contract made between the petitioner and the respondent was not breached by petitioner; because the petitioner was not bound by the terms of an order given by respondent to an intermediary in the transaction, but never communicated to the petitioner by such intermediary; and because the tender by the petitioner of the lumber ordered by respondent, to a carrier, for shipment on the deck, constituted a full performance by the petitioner of the contract made between the petitioner and the respondent.

The evidence in the record shows that the petitioner received from Brazilian Minerals and Timbers Corp., the intermediary in the transaction, order No. 2049, for the second lot of 250,000 feet of lumber (R., 72). It appears that the intermediary received from the respondent a confirmatory order, bearing No. 2330 (R., 128 and 129), but there is no evidence anywhere in the record that order No. 2330 was communicated to the petitioner. Some argument was made in the lower courts by respondent that petitioner was bound by the confirmatory order bearing No. 2330, because the intermediary was petitioner's agent. The District Court accepted that argument, but the argument was not passed upon by the Circuit Court of Appeals which considered the question unimportant to its decision.

The only evidence in the record which bears upon the legal relationship of the intermediary to the respondent and the petitioner consists of the following:

1. The statement contained in the affidavit of Julius Stulman, President of the respondent, which reads:

> "Although Mr. Alvarez died some time ago, we were fortunate in obtaining from Brazilian, its file of correspondence with Madeirense" (R., 109).

2. The agreement by the respondent to pay to the intermediary a commission of 10% of the F. O. B. value of the lumber purchased by respondent from petitioner (R., 115, 117, 127 and 129).

We submit that, on the evidence outlined, the intermediary was, in fact, the agent of the respondent; and that the petitioner was not, therefore, bound by the respondent's order bearing No. 2330, but that petitioner's obligations were limited by the terms of order No. 2049, received by the petitioner from the intermediary.

As appears from order No. 2049 (R., 72 and 73), there was no requirement that the second lot of 250,000 feet should be shipped below deck.

It follows, accordingly, that when petitioner tendered to the carrier the lumber called for by order No. 2049, for shipment on deck (R., 84), the petitioner discharged its obligations under the order which was specifically designated a C. and F. contract, and fully performed its contract. *Thames & Mersey Ins. Co.* v. *U. S.*, 237 U. S. 19; *Seaver* v. *Lindsay Light Co.*, 233 N. Y. 273.

The majority opinion of the Circuit Court of Appeals makes the point that, even if the intermediary should not be deemed the agent of the petitioner, the contract made by petitioner would, in any event, require that the lumber be shipped below deck, because such contract calls for lumber "naturally dried" and for "clean lumber, perfectly dried". The Court added that petitioner's cable informing respondent that the second lot would have to be shipped on deck indicates that petitioner knew it did not have the right to do so.

We submit that the Circuit Court of Appeals was not warranted in drawing these conclusions for the following reasons:

1. This Court may take judicial notice of the well known fact that merchandise which may suffer water dam-

age is often shipped on deck; and that such shipments are protected from damage by water by being well covered with water resisting materials; just as it will take judicial notice of the fact that merchandise shipped on deck may suffer water damage if not properly protected.

2. The sending of a cable by the petitioner, informing respondent that the lumber would have to be shipped on deck can be construed as a friendly act on the part of the petitioner toward the respondent, as well as an act indicating knowledge on the part of the petitioner that it did not have the right to ship the lumber on deck. Undoubtedly, both parties would have preferred that the lumber be shipped below deck; but the controlling consideration is the contract itself, which contains no such requirement.

POINT IV

The application for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT M. PARKER,
of Counsel, for Petitioner.